INDEX

CASES CITED

TEXT BOOKS CITED

STATUTES CITED

Revised Statutes—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1925

No 23, ORIGINAL

EX PARTE: IN THE MATTER OF THE STATE OF MARYLAND

CASE "A"

PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

BRIEF FOR RESPONDENTS IN SUPPORT OF RETURN TO THE RULE

GROUNDS OF JURISDICTION

This is an original petition by the State of Maryland for a writ of mandamus directed to the District Court of the United States for the District of Maryland, and to the Judge of that court. The jurisdiction of this Court is invoked under Section 234 of the Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1156), which provides:

> The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admi-

> ralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party.

On October 12th, 1925, this Court granted a rule to show cause why a peremptory writ should not issue. The rule was made returnable on or before November 16th, 1925.

STATEMENT

The purpose of the petition is to compel the District Court to remand to the Circuit Court of the State for Harford County an indictment charging four Federal Prohibition Agents and their chauffeur with the crime of murder. In Case "B" (Original No. 24), the State seeks to compel the remand of an indictment charging the same five defendants with conspiracy to obstruct justice. In Case "C" (Original No. 25), the State seeks to compel the remand of an indictment charging *one* of these defendants with perjury. Separate petitions and supporting briefs have been filed by the State in the three cases, "A," "B," and "C." To meet these, separate returns and supporting briefs will be filed by the respondents.

The facts in the present case, which involves a charge of murder, are these:

Four of the defendants (Ford, Barton, Ely, and Stevens) were duly appointed Federal Prohibition Officers. Their commissions empowered them—

> to act under the authority of and to enforce the National Prohibition Act and Acts supplemental thereto *and all Internal Revenue Laws relating to the manufacture, sale, transportation, control, and taxation of intoxicating liquors* * * * and to execute and perform all the duties delegated to such officers by law. (Exhibit A to Petition of the State of Maryland, pp. 40–41.)

The fifth defendant, Trabing, was a chauffeur. During the period covered by the indictment he was in the employ of the Federal Prohibition Director for the State of Maryland, and was acting as chauffeur and helper to the other four defendants. (Exhibit A to Petition of the State of Maryland, p. 41.)

On November 19th, 1924, the defendants were ordered by the Federal Prohibition Director for Maryland to investigate the alleged unlawful distilling of liquor on an unoccupied farm near the village of Madonna, Maryland. They went there by motor, arriving shortly after noon, and discovered in a secluded valley the materials for illicit distilling. They hid themselves in the woods.

Soon afterwards a number of men came up carrying a still. When the officers made their presence known, the men dropped the still and fled. The officers pursued, but failed to arrest anyone. They thereupon returned to the still, destroyed the materials, and proceeded back to their car to return to Baltimore and report the affair to their superior. On their way to the car, about 400 or 500 yards from the site of the still, they found a man (Wenger) lying mortally wounded. They picked him up and took him in their car to Jarrettsville and thence to Bel Air, in search of a doctor. By the time one was found, the man was dead. The officers then at once reported the matter to the State's Attorney in Bel Air. Upon learning that his informants were Prohibition Officers, the State's Attorney at once ordered all five to be placed under arrest. They were confined in the local jail that night, and the next day they gave further information to the State officials and to the Coroner's jury. The charges of conspiracy (Case "B") and perjury (Case "C") are predicated upon the testimony which they gave before the Coroner. On the evening of November 20th they were released on bail at the instance of the United States Attorney. (Exhibit A to Petition of the State of Maryland, pp. 30–32.)

In February, 1925, an indictment against the defendants for murder was returned by the Grand Jury of the State to the Circuit Court for Harford County. The defendants petitioned for removal of

the cause, under Section 33 of the Judicial Code. Removal was granted. Subsequently, the State of Maryland moved to quash the order of removal and to remand the prosecution to the State Court. After argument upon this motion, leave was granted to amend the petition for removal. The petition was accordingly amended to set forth in greater detail all the circumstances surrounding the indictment. Proper allegations were included stating that the defendants were Federal officers and that they had been acting in the discharge of their duties at the time when the alleged murder occurred. It was not admitted, however, that the defendants had actually shot Wenger, or that they had had anything to do with his death. It was alleged that the indictment for murder was—

> a criminal prosecution on account of acts alleged to have been done by your petitioners at a time when they were engaged in the performance of their duties as Federal Prohibition Officers and chauffeur for Federal Prohibition Officers as set forth in aforegoing paragraphs.

Upon this amended petition, removal was granted. The State of Maryland again moved to quash the order of removal and to remand the cause. Its motion was denied. To compel the District Court to remand the cause, the State is now seeking a writ of mandamus from this Court.

ARGUMENT

SUMMARY

I. THE PROSECUTION WAS PROPERLY REMOVABLE UNDER SECTION 33 OF THE JUDICIAL CODE, THE DEFENDANTS BEING "PERSONS ACTING BY AUTHORITY OF THE REVENUE LAWS."

II. EVEN IF THE DEFENDANTS ARE NOT REGARDED AS "REVENUE OFFICERS" IN THE TECHNICAL SENSE, THE PROSECUTION WAS NEVERTHELESS REMOVABLE UNDER SECTION 33 OF THE JUDICIAL CODE AND SECTION 28 OF THE NATIONAL PROHIBITION ACT (ACT OF OCT. 28, 1919, C. 85, 41 STAT. 305, 316).

III. THE PROSECUTION WAS REMOVABLE NOTWITHSTANDING THE FACT THAT THE DEFENDANTS DID NOT ADMIT THAT THEY HAD ANY PART IN THE KILLING OF WENGER.

IV. THE DECISION OF THE DISTRICT COURT GRANTING THE PETITION FOR REMOVAL, AND DENYING THE MOTION TO REMAND, WAS AN EXERCISE OF LAWFUL JUDICIAL DISCRETION, AND CAN NOT BE CONTROLLED BY MANDAMUS.

I

The prosecution was properly removable under Section 33 of the Judicial Code, the defendants being "persons acting by authority of the revenue laws."

Section 33 of the Judicial Code, as amended by the Act of August 23, 1916, c. 399 (39 Stat. 532) provides:

> That when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right,

> title, or authority claimed by such officer or other person under any such law, * * * the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced or of the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. * * *

In the case at bar, four of the defendants are admitted to have been acting under commissions empowering them to enforce—

> the National Prohibition Act and Acts supplemental thereto *and all Internal Revenue Laws* relating to the *manufacture, sale, transportation, control, and taxation of intoxicating liquors* (*supra*, p. 3).

The fifth defendant, Trabing, was acting as chauffeur and helper to the four officers. He was at

all times acting under their orders and under the orders of their superior, the Prohibition Director for the State. His case clearly falls within the language of Section 33 of the Judicial Code, authorizing removal of prosecutions—

> *against any person acting under or by authority of any such officer.*

If the indictment against the four officers is removable, the indictment against Trabing is removable also. If the indictment against them is *not* removable, neither is that against Trabing. The five defendants stand on an equal footing, so far as removal is concerned. *Davis* v. *South Carolina,* 107 U. S. 597. This point, we understand, is not disputed by counsel for the State of Maryland, who apply the same language and arguments, throughout their petition and brief, to all five defendants alike.

The question therefore arises: Can these five defendants be regarded as "officers acting by authority of any revenue law of the United States," or as "persons acting under or by authority of any such officer"? It is submitted that at the time in question they were so acting.

At the time set forth in the indictment for murder, the defendants had been engaged in the search for an illicit still, and were on their way back to report its destruction. Their commissions empowered them to enforce not merely the National Prohibition Act but also the Internal Revenue Laws which dealt with intoxicating liquor.

There are many sections of the Revised Statutes, long anterior to the National Prohibition Act, which deal with the subject of illicit distilling. As examples may be mentioned: Rev. Stats. 3257, penalizing distillers who defraud the United States out of any tax; Rev. Stats. 3258, requiring all stills to be registered; Rev. Stats. 3259, penalizing all persons who set up stills without notice; Rev. Stats. 3260 and 3281, requiring distillers to give bonds, and penalizing those who fail to do so; and Rev. Stats. 3282, forbidding mash, etc., to be made or fermented save in a lawful distillery.

These sections are still presumably in force, having been revived by Section 5 of the Act of November 23, 1921, c. 134 (42 Stat. 222, 223). *United States* v. *Stafoff*, 260 U. S. 477. And their provisions were clearly applicable to the circumstances disclosed by this case. The defendants, while searching for an illicit still in the woods, were not acting merely to enforce the National Prohibition Act alone. They were acting equally to enforce the provisions of the older revenue laws. *United States* v. *Page*, 277 Fed. 459. Their power to make searches and seizures was derived not only from the National Prohibition Act but also from Rev. Stats. 3166, 3276, 3278, and 3332. Cf. *Steele* v. *United States* (case 2), 267 U. S. 505. Their commissions empowered them to act under both the old and the new laws alike.

The National Prohibition Act may or may not itself be a " revenue law " (*Lipke* v. *Lederer*, 259

U. S. 557); and Government officers relying on its provisions alone may or may not be " revenue officers " in the strictest technical sense. There are many provisions, even in the National Prohibition Act, which are clearly designed for the raising of revenue. But the older provisions of the Revised Statutes, at any rate, are revenue measures under which taxes may still be imposed. Congress may tax liquors, even though their production is forbidden. *United States* v. *Yuginovich,* 256 U. S. 450. And at any rate since the amendatory Act of 1921 (Act of Nov. 23, 1921, c. 134, 42 Stat. 222) Congress has clearly manifested its intention to do so. *United States* v. *Stafoff, supra.* Even if the defendants in this case had never been commissioned to enforce the Internal Revenue laws, they would none the less have been entitled to removal of a prosecution begun against them for acts alleged to have been committed while enforcing the revenue laws. The statute protects not merely " revenue officers," but also all officers " acting by authority of any revenue law," and all persons " *acting under or by authority of any such officer.*" A commission as a " revenue officer " is not a necessary requirement for removal of a prosecution. *Davis* v. *South Carolina,* 107 U. S. 597. And it is submitted that Government agents, holding commissions to enforce both the old and the new laws, are entitled in the case at bar to the same rights as " revenue officers," especially when they are shown to have been engaged in a type of duty (searching

for illicit stills) which arises under the revenue laws, and which has been carried on by revenue officers since the foundation of the Government. *United States* v. *Page*, 277 Fed. 459. Even if they are not themselves "revenue officers," the Commissioner of Internal Revenue is such an officer; and the defendants were clearly "persons acting under or by authority of" the Commissioner. So, in any event, their case is clearly covered by the language of Section 33 of the Judicial Code. And if they are entitled to the rights of revenue officers, it necessarily follows that, in proper cases, prosecutions against them are removable to the Federal Courts.

II

Even if the defendants are not regarded as "revenue officers" in the technical sense, the prosecution was nevertheless removable under Section 33 of the Judicial Code and Section 28 of the National Prohibition Act (Act of Oct. 28, 1919, c. 85; 41 Stat. 305, 316).

Even if it be conceded, however, that the defendants were neither "revenue officers" in the technical sense, nor persons "acting under or by authority of any such officer," it does not necessarily follow that their prosecution could not be removed from the State Court. It is submitted that prosecutions against *prohibition agents* are properly removable, as well as prosecutions against "*revenue officers.*"

Section 28 of the National Prohibition Act (Act of Oct. 28, 1919, c. 85; 41 Stat. 305, 316) provides:

> The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power *and protection* in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

It is submitted that the " protection " extended to prohibition agents by this section includes the right to seek removal of prosecutions from the State Courts. Upon this point the views of the lower Federal Courts have been divergent. But the great majority support the Government's contention, and hold that prosecutions against prohibition agents are removable under the combined operation of this section and of Section 33 of the Judicial Code.

> *United States* v. *Pennsylvania*, 293 Fed. 931.
> *Massachusetts* v. *Bogan*, 285 Fed. 668.
> *Morse* v. *Higgins*, 273 Fed. 830, 832.
> *Oregon* v. *Wood*, 268 Fed. 975.

To the same effect is an opinion handed down on November 2, 1925, by the District Court for the Southern District of Illinois, in the case of *Illinois* v. *Moody et al.* This opinion has not yet been re-

ported. It is set forth in full in the Appendix, *infra,* page 35.

The only decisions to the contrary are *Smith* v. *Gilliam,* 282 Fed. 628, and *Wolkin* v. *Gibney,* 3 F. (2nd) 960. The latter of these cases merely cites the former as an authority, and assigns no independent reasons for the decision.

In *Smith* v. *Gilliam,* Judge Evans was of the opinion that the "protection" given by Section 28 did not include the right of removal. His opinion contains a careful examination of the earlier statutes dealing with the liquor traffic, and a summary of the powers of search and seizure conferred by those statutes upon revenue officers, omitting the removal statutes. He concludes, apparently, that the only "protection" afforded by Section 28 was the legal justification which resulted from the grant of power to make searches, seizures, and arrests. In other words, prohibition officers are given the "power" to make arrests in certain cases; therefore they are given "protection" (i. e., legal justification, which can be pleaded as a defense to an action for assault) while making such arrests.

It is submitted that such a conclusion robs the word "protection" of nearly all its meaning. The grant of power to an officer to make an arrest or a seizure carries with it, by necessary implication, the right to plead justification of law if sued for his acts. That right need not be meticulously set forth

in the statute. It is the inevitable concomitant of the grant of power. *In re Neagle,* 135 U. S. 1, 58.

"Protection" implies something more than the right to plead justification for acts done in pursuance of law. It implies also the right to conduct one's defense in a court where that defense can most properly be made. As was said in *Massachusetts* v. *Bogan,* 285 Fed. 668, 669:

> The right of removal therefore depends upon the correct construction of section 28 of the National Prohibition Act (41 Stat. 305), which confers upon them "all the power and protection in the enforcement of this act * * * which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States." The right now claimed is obviously not a "power" in the enforcement of the act. Is it a "protection?" The natural meaning of the word would be protection against resistance or attack when carrying out their duties; and there are provisions in the revenue laws to which it might apply. The danger, however, which such an officer would incur in the performance of his duties, if subject to prosecution or suit in local courts, in perhaps an unfriendly atmosphere and surroundings, might be very considerable. In the case of revenue officers it was recognized by Congress as sufficiently serious to require a right of removal of cases against them to the federal courts as a protection to them

> in the discharge of their duties. Every reason which exists for such right in the case of revenue officers exists with respect to prohibition officers.

The removal provisions of Section 33 of the Judicial Code are the lineal descendants of Section 3 of the Force Act of 1833, directed against Nullification in South Carolina (Act of March 2, 1833, c. 57; 4 Stat. 632, 633). The President's message on that occasion, after reciting the emergency and recommending that collectors of customs be authorized to use force to defend their possession of goods, goes on to say:

> This provision, however, would not shield the officers and citizens of the United States, acting under the laws, from suits and prosecutions in the tribunals of the State which might thereafter be brought against them, nor would it protect their property from the proceeding by distress, and it may well be apprehended that it would be insufficient to insure a proper respect to the process of the constitutional tribunals in prosecutions for offenses against the United States *and to protect the authorities of the United States, whether judicial or ministerial, in the performance of their duties.* (Richardson's Messages and Papers of the Presidents, vol. II, pp. 610, 630.)

The President therefore recommended, as a measure of protection to Federal revenue officers, the enactment of a suitable removal statute. His

recommendation was embodied in Section 3 of the Force Act.

In the debates on that Act in the Senate, Senator Frelinghuysen (a member of the Judiciary Committee which drafted and reported the bill) declared:

> The third section of the bill was defensive * * *. It had become indispensable to *protect* the United States' officers. (Debates in Congress, vol. 9, part 1, p. 329.)

Daniel Webster (likewise a member of the Judiciary Committee)—

> thought this the most important provision of the whole bill, as respects the *protection* of the federal officers * * *.
>
> We give a chance to the officer to defend himself where the authority of the law was recognized. (*Ibid.* 461.)

And Senator Wilkins (also a committee member):

> Said this section was indispensably necessary and by the amendment just adopted, was applied to the revenue laws only. The committee thought this would be a less offensive mode of *protecting* the officers of the Government than to take an appeal from the solemn judgment of the highest State tribunal, which last course had been particularly offensive to some States of the Union. (*Ibid.* 461.)

It is obvious, then, that the removal provisions of the Force Act were designed as a measure of

protection to the agents of the United States. They have been uniformly so regarded by the courts.

Davis v. *South Carolina*, 107 U. S. 597.
Tennessee v. *Davis*, 100 U. S. 257.
The Mayor v. *Cooper*, 6 Wall. 247, 253.
Massachusetts v. *Bogan*, 285 Fed. 668, *supra*.
In re Duane, 261 Fed. 242.
Peyton v. *Bliss*, Fed. Cas. No. 11055.
Findley v. *Satterfield*, Fed. Cas. No. 4792.
State v. *Hoskins*. 77 N. Car. 530.

In *Findley* v. *Satterfield*, *supra*, the court used language very similar to that employed half a century later in *Massachusetts* v. *Bogan*, *supra* (p. 14):

> Congress has power to levy and collect taxes and excises, and to make all laws necessary and proper to carry that power into execution. This includes the power to employ suitable officers and agents, *and to protect them from accountability in the state courts for acts done, or in good faith alleged to have been done, in the course of their duty. We can not say that this protection is not necessary and proper for the prompt and effective collection of the revenue.* It is obvious that where a local sentiment adverse to a particular revenue law could exert itself in irremovable prosecutions in the local courts against persons executing that law, the collection of the revenue might be seriously impeded. Congress has thought proper to guard against such impediments by the law that we are now consid-

> ering, and we are satisfied that it is a constitutional means to a constitutional end. (Italics ours.)

In *Peyton* v. *Bliss, supra,* it was pointed out by the Court that the only "revenue laws" generally known when the Force Act was passed were the customs laws. But the Force Act was held to be prospective in its operation and to apply to revenue laws, subsequently enacted, of a type unknown in 1833.

To grant "*protection*" to Federal officers by allowing them to remove prosecutions to the Federal Courts is therefore no new policy of the National government. This Court declared in *Tennessee* v. *Davis,* 100 U. S. 257, 262:

> As was said in *Martin* v. *Hunter* (1 Wheat. 363), "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their *protection*—if their *protection* must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may

affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

We do not think such an element of weakness is to be found in the Constitution. The United States is a Government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it. (Italics ours.)

It is submitted that every reason which formerly existed for granting removal to revenue officers extends with equal force to the case of prohibition agents. If the language of Section 28 of the National Prohibition Act is to be given its reasonable

meaning, it must be interpreted as granting the right of removal to officers acting under its provisions. The weight of Federal decisions supports this view; and it is submitted that those decisions are sound.

III

The prosecution was removable notwithstanding the fact that the defendants did not admit that they had any part in the killing of Wenger.

It is argued on behalf of the State of Maryland that the prosecution was not properly removable because the defendants did not admit having committed the murder for which they stand indicted. Counsel for the State concede that removal would have been proper if the defendants had confessed that they killed Wenger, and had proceeded to justify the killing under some provision of the Internal Revenue laws. But because the defendants admitted no connection with the killing—because they stated merely in their petition that they had found the body, that they had forthwith reported the matter to the State's Attorney, and that the latter, upon learning that they were Federal officers, promptly ordered them into custody—for these reasons, it is argued, the right of removal must be denied.

It is submitted that this argument is unsound. It is undisputed that the indictment is for an alleged murder which, *if committed by the defendants*, was committed by them while performing their duty, during the course of a lawful search and

seizure. But their amended petition makes no admission that they killed Wenger, whether in self-defense or otherwise.

The absence of such an admission, it is submitted, is immaterial with respect to the right of removal. A Federal officer may be taken from his duties and put to trial in a possibly hostile court, and the functions of the Federal Government may be harassed or impeded, by an indictment for something which the officer never did, as well as by an indictment for something which he did in self-defense. The officer is as much entitled to make his defense in the *Federal* court on the theory that he never did the act, as he is on the theory that he did it under justification. He is not required to disclose the details of his defense before trial, save in so far as it is necessary to establish the right of removal. To require an admission by him, under oath, in his petition for removal, that he did the act charged, would be unprecedented. Such a requirement, it may well be argued, would be a violation of the privilege against self-incrimination. In the language of common-law pleading, a *traverse* will suffice to warrant removal. It is not necessary to put in a *plea in confession and avoidance.*

The case upon which the State of Maryland principally relies, on this point at least, is *Illinois* v. *Fletcher,* 22 Fed. 776. In that case removal was sought of a prosecution for murder, arising out of an election riot in Chicago. The defendants were

deputy marshals of the United States. In their petition for removal, they set forth at length their theory as to how the deceased had been shot, adding a denial that they had shot him. The Circuit Court, denying their petition, said (22 Fed. at p. 778):

> If the petition simply averred that the defendants stood indicted in the state court for an act done by them as deputy marshals, or under color of their office, or the law authorizing their appointment and defining their powers and duties, without describing the act or circumstances under which it was committed, it would, perhaps, be the right and duty of this court to assert jurisdiction of the case; at least, until it should appear that the claim was unfounded. *Tennessee* v. *Davis,* 100 U. S. 257.
>
> It is charged in the indictment that the petitioners shot and murdered William Curnan on the 4th day of November, 1884, in the county of Cook and state of Illinois, and the petition distinctly asserts that " neither of them fired any shot or did any act by reason of which the said Curnan came to his death, as set forth in the indictment." If they neither did the shooting nor in any way contributed to Curnan's death, it follows that they have not been indicted for an act or acts done by them as deputy marshals of the United States, and this court has no right to interfere with the jurisdiction of the state court.

The indictment in that case arose out of an arrest for breach of the peace, which the defend-

ants, *as Federal officers,* had no right to make. In making it, they were acting merely as private citizens and could not claim that they were acting under color of their office or of the Federal laws. This fact alone serves to distinguish that case from the case at bar. And the petition for removal in *Illinois* v. *Fletcher* on its face disclosed facts showing clearly that no right of removal existed.

In so far as *Illinois* v. *Fletcher* holds that admission of the act charged is an essential allegation in every petition for removal, it has twice been disapproved in subsequent decisions.

In *Alabama* v. *Peak,* 252 Fed. 306, the defendant, a Federal narcotic inspector, was indicted in the State court for the larceny of $175 in currency from one Lenford. His petition for removal set forth that he had been investigating violations of the revenue laws and was on his way back to report to his superior when he met Lenford; that Lenford afterwards claimed he had been robbed; and that the defendant had been arrested and indicted on Lenford's complaint. The petition added (252 Fed. at p. 307):

> but petitioner emphatically denies that he was on said occasion, or any other occasion, guilty of any act of grand larceny of the felonious taking of Lenford's or any one else's money; but that the whole course of his conduct and acts on said occasion was in the performance of his official duties as aforesaid.

The court held this petition sufficient to warrant removal and denied a motion by the State to remand the prosecution, saying (252 Fed. 306, 309):

> It seems to me, therefore, that the petition is sufficient under the terms of the decision relied on by the state of Alabama; but I can not pass the question without stating that I am not at all satisfied with the correctness of the position taken by the court in *State of Illinois* v. *Fletcher*, that nothing short of a positive averment that petitioners did the act for which they stand indicted, and did it in the line of their duty as deputy marshals of the United States or under color of their authority as such officers, will entitle them to the removal of the case from the state court to this court for trial.
>
> It is true that the terms of the act as written give the right of removal when a suit or criminal prosecution is commenced against a revenue officer on account of any act done under color of his office. I do not, however, concede that the accused must necessarily admit the doing of the specified act in the terms as charged in the state indictment. I think that he has just as much right, if whatever act he did was under color of his office, to have the benefit of a trial of the facts in the federal court as well as to try the question of the intent with which these acts were done.

In *Oregon* v. *Wood*, 268 Fed. 975, the indictment charged five Federal Prohibition Agents with the crime of involuntary manslaughter. The petition

for removal *denied the killing,* and stated that the petitioners, at the time of the acts charged, were "acting as such officers and under color of their office." The court held this to be sufficient, saying (268 Fed. at p. 979):

> Further criticism of the petition consists in the argument that, as it is represented that petitioners did not kill Hedderly, the representation is tantamount to a denial of doing the very act for which they now claim protection, and therefore it was incumbent upon petitioners to show a justification of their act; that is, that it was done under color of their office as revenue officers of the United States. There is a fallacy in the reasoning in two particulars: First, the petition does show that the act was done under color of their office as revenue officers; and second, it may well be that petitioners did not kill Hedderly, but nevertheless they are indicted for killing him, and the essential allegation for the purposes of this inquiry is that the act charged against them was done under color of their office. Their real defense will come later. *State* v. *Peak, supra.*

It is submitted that the reasoning in both of these cases is sound. To establish the right of removal, the petition need not state that the accused officer has done the acts for which he stands indicted. It need only set forth, to the satisfaction of the District Court, that at the time of the alleged crime he was acting under color of his office or under authority of the law; and it must allege that

the prosecution is for acts alleged to have been done in the performance of his duty.

In the proceedings for removal, Congress has not made it necessary for the accused officer to disclose before trial his complete defense to the indictment. Nor has Congress required him to adduce full evidence showing a complete justification of his official acts. It is enough, in the words of the statute, to show that the prosecution arises

> on account of any act done under color of his office or of any such law.

Acts done " under *color* of office " may very well prove insufficient to establish a complete justification. The phrase " color of office " covers a claim which may later turn out to be groundless, as well as a claim which full investigation shows to have been well founded. Indeed the former meaning is probably the more usual one.

> *Bouvier,* L. D., s. v. *Color of Office.*
> *Virginia* v. *De Hart,* 119 Fed. 626.
> *Griffiths* v. *Hardenbergh,* 41 N. Y. 464, 469.
> *Wilson* v. *Fowler,* 88 Md. 601, 605.

Similarly, the phrase " color of law " applies as well to claims which prove, on examination, to be groundless, as to those which are well founded. *McCain* v. *Des Moines,* 174 U. S. 168, 175.

For the purposes of removal, a *color* of official capacity or of legal justification will suffice. The statute does not require absolute and detailed *proof* of all the attendant circumstances before removal

can be granted. It requires only a fair showing that the officer was acting at the time in the *probable* course of his duty. This Court declared, in *Tennessee* v. *Davis,* 100 U. S. 257, 261:

> But the act of Congress authorizes the removal of any cause, when the acts of the defendant complained of were done, *or claimed to have been done,* in the discharge of his duty as a Federal officer. *It makes such a claim a basis for the assumption of Federal jurisdiction of the case, and for retaining it, at least until the claim proves unfounded.* (Italics ours.)

Whether the officer was in fact acting in the course of his duty, and if so, whether the evidence will establish a complete defense, are questions which can be answered only at the trial. To require the defendant to plead and to prove his innocence in the removal proceedings is to impose a burden not intended by Congress, and not warranted by the language of the Act. It is submitted that the petition for removal in the case at bar was amply sufficient to warrant the action of the District Court, and that further pleading or proof was unnecessary.

IV

The decision of the District Court granting the petition for removal, and denying the motion to remand, was an exercise of lawful judicial discretion, and can not be controlled by mandamus.

It is undisputed law that the writ of mandamus will lie to compel an inferior tribunal to hear and to decide a case, but not to compel it to decide in a

particular way. This was the rule of the common law; and it has been the rule of this Court since the earliest times.

In *United States* v. *Lawrence, Judge,* 3 Dall. 42, 53, this Court declared—

> * * * we have no power to compel a judge to decide according to the dictates of any judgment, but his own.

In *Ex parte Bradstreet,* 8 Pet. 588, 590, Chief Justice Marshall stated:

> We have only to say, that a judge must exercise his discretion in those intermediate proceedings which take place between the institution and trial of a suit; and if in the performance of this duty he acts oppressively, it is not to this court that application is to be made.

Cf. *Ex parte Taylor,* 14 How. 2, 12; *Ex parte Secombe,* 19 How. 9, 15; *Ex parte Newman,* 14 Wall. 152; *Ex parte Cutting,* 94 U. S. 14, 20; High, Extraordinary Legal Remedies (3rd ed.), S. 149.

In the case of *In re Rice,* 155 U. S. 396, 403, this Court said:

> The writ of mandamus can not be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate discretion. The writ can not be issued to perform the office of an appeal or writ of error, *even if no appeal or writ of error is given by law.* (Italics ours.)

Cf. *Ex parte Roe,* 234 U. S. 70, 73, and cases there cited; *Ex parte Slater,* 246 U. S. 128, 134;

Ex parte Chicago, Rock Island and Pacific Railway, 255 U. S. 273, 275.

In *Ex parte Hoard,* 105 U. S. 578, it was laid down that when the trial court has denied a motion to remand a cause which has been removed from the State court, mandamus will not lie to compel a remand. And since the decision in *Ex parte Harding,* 219 U. S. 363, the rule in *Ex parte Hoard* has been uniformly applied to all disputed removals of *civil* causes. In such cases the decision of the District Court either granting or denying a motion to remand is not reviewable by mandamus.

It is true, as counsel for the State of Maryland point out, that an exception may perhaps be recognized with respect to the removal of *criminal* causes. And in three cases this Court has granted mandamus to compel the remand of criminal cases wrongfully removed from the State courts.

Virginia v. *Rives,* 100 U. S. 313.
Virginia v. *Paul,* 148 U. S. 107.
Kentucky v. *Powers,* 201 U. S. 1.

But it must be noted that in each of these cases the petition for removal upon its face clearly showed that no grounds for removal existed. The record in each case demonstrated the lack of jurisdiction of the Federal court. In such cases, assumption of jurisdiction is, of course, wholly unwarranted, and may be corrected by mandamus. But, on the other hand, where the jurisdiction of the lower court is doubtful, the remedy by mandamus will be refused. *Ex parte Muir,* 254 U. S. 522.

In *Virginia* v. *Rives,* 100 U. S. 313, the two petitioners (negroes) were under indictment in the State court for murder. They sought and obtained removal under Rev. Stats. 641, on the ground that the State had deprived them of equal rights by excluding all negroes from the *venire.*

The State then petitioned for mandamus to compel remanding of the prosecution; and this Court granted the writ. The reason for the decision was plain. It was clearly shown that the *laws* of Virginia did not in any case exclude negroes from jury panels. Such exclusion was merely the unauthorized practice of local officials. This Court held that the protection afforded by Rev. Stats. 641 extended only to cases where there had been a denial of equal rights by the *law* of the State. Denial of equal rights by the wrongful practice of State officials, (unauthorized by law) furnished no ground for removal. The petition of the accused negroes, therefore, on its face failed to disclose any possible ground for removal, and the Circuit Court had no possible ground for assuming jurisdiction.

Kentucky v. *Powers,* 201 U. S. 1, was a case very similar to *Virginia* v. *Rives.* The case arose out of a bitter partisan conflict between two claimants for the governorship of Kentucky. The facts are set forth at length in the opinion below. 139 Fed. 452. Powers, the accused, had killed Goebel, the Democratic claimant to the governorship, and had been pardoned by Taylor, the Republican claimant. At a previous trial the State court had refused to

recognize the pardon, presumably on the ground that Taylor was not the lawful governor. Powers petitioned for removal under Rev. Stats. 641 and 642, alleging discrimination against him in respect of his equal rights under the Constitution. The facts upon which he relied were chiefly: (1) the failure of the State court at the previous trial to recognize his pardon; and (2) the action of local officials in making up a jury panel composed entirely of "Goebel Democrats," strongly biased against him.

This Court again pointed out that where discrimination is due, not to a State statute, but to illegal or corrupt acts of State officials, unauthorized by statute, no right of removal exists. The remedy is by proceedings in the State court, and ultimately by writ of error from the Supreme Court of the United States. The petition for removal on its face showed nothing to warrant removal, and for this reason mandamus was granted.

Virginia v. *Paul,* 148 U. S. 107, is the only case where this Court has granted mandamus to remand a prosecution against a Federal officer. That decision was upon a point altogether different from the points involved in the case at bar. In *Virginia* v. *Paul,* one Carrico, a deputy marshal of the United States, had been arrested for murder on the warrant of a justice of the peace. He petitioned for removal, on the ground that he had committed the killing in self-defense while "acting by and under the authority of the internal revenue laws."

His petition was granted. At the time the petition was filed, Carrico had been arrested but had *not* been indicted.

This Court granted mandamus to compel the remanding of the cause, upon the ground that no prosecution had been "*commenced*" at the time removal was sought. A prosecution for murder in Virginia was held to be "*commenced,*" within the meaning of the removal statute, only by the finding of an indictment, and not by the issuance of a warrant of arrest. Until the indictment is found, there is no "prosecution" to remove. The Circuit Court was therefore without any jurisdiction to order removal upon the petition filed in that case.

It is manifest that none of the three decisions just cited is applicable to the case at bar. Not one of those decisions turned upon the sufficiency of allegations as to the official capacity of the accused, or as to the fact that the indictment was for a crime committed in the course of his duty. The lower court in each case was clearly shown to have acted beyond its jurisdiction. Federal jurisdiction was not merely doubtful; it was non-existent. And for that reason mandamus was granted in each case.

In the case at bar it is submitted that the District Court had ample facts before it upon which to base its assumption of jurisdiction. And in assuming jurisdiction upon the facts thus before it that court exercised its lawful judicial discretion. Upon the

amended petition for removal and the motion by the State to quash and remand, the court was called upon to decide mixed questions of law and of fact. The motion to quash and remand, it must be noted, directly traversed allegations of fact contained in the amended petition. It denied the allegations contained in paragraph 2 of that petition, as to the official capacity of the defendants (Exhibit A to petition for mandamus, at pp. 29, 36), and an issue of fact was thereby raised, for the decision of the District Court. It is submitted that the decision of the District Court upon the questions here before it was final. As this Court said in *Tennessee* v. *Davis,* 100 U. S. 257, 261 (already quoted, *supra,* p. 27):

> But the act of Congress authorizes the removal of any cause, when the acts of the defendant complained of were done, *or claimed to have been done,* in the discharge of his duty as a Federal officer. *It makes such a claim a basis for the assumption of Federal jurisdiction of the case,* and for retaining it, at least until the claim proves unfounded. (Italics ours.)

It is submitted that the assumption of Federal jurisdiction in this case was a lawful judicial act, amply warranted by the record before the District Court. *Virginia* v. *Felts,* 133 Fed. 85; *Virginia* v. *De Hart,* 119 Fed. 626.

The writ of mandamus is an extraordinary remedy. Its purpose is to correct clear errors of jurisdiction, not errors of discretion.

If jurisdiction is clear, or even if jurisdiction is doubtful, the writ will not lie. *In re Cooper,* 143 U. S. 472, 506, 509; *Ex parte Muir,* 254 U. S. 522.

It is submitted that in the case at bar there is no reason for the use of this extraordinary remedy or for interference with the lawful jurisdiction of the District Court. Even on the unwarranted assumption that error has been committed, it would be at most an error of judicial discretion upon an issue of law *and fact,* and mandamus will not lie to correct it.

CONCLUSION

It is therefore respectfully submitted that the rule should be discharged and that the petition for a writ of mandamus should be denied.

WILLIAM D. MITCHELL,
Solicitor General,

WILLIAM J. DONOVAN,
Assistant to the Attorney General,
Of Counsel for the Respondents.

NOVEMBER, 1925.

APPENDIX

UNREPORTED DECISION HANDED DOWN BY JUDGE FITZHENRY IN THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS ON NOVEMBER 2, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

People of the State of Illinois v. *Walter Moody.* Criminal (3986), No. 313, indictment for assault with intent, etc.

People of the State of Illinois v. *J. E. Asher, Max Hartzig, Walter Moody, John Doe, and Eugene Doe.* Criminal (3987), No. 314, indictment for larceny.

People of the State of Illinois v. *J. E. Asher, Max Hartzig, Walter Moody, John Doe, and Eugene Doe.* Criminal (3988), No. 315, indictment for robbery.

People of the State of Illinois v. *J. E. Asher and Walter Moody.* Criminal (3989), No. 316, indictment for assault with intent, etc.

MEMORANDUM

The September Grand Jury of the Circuit Court of Peoria County returned the indictments here involved. Defendant Walter Moody is a Deputy

United States Marshal in the Southern District of Illinois. The other two defendants were Federal prohibition agents, appointed and acting under and by virtue of the provisions of the National Prohibition Act. On the —— day of October, 1925, defendants filed their petitions, reciting the indictments in the State Court and averring, at the several times in question they were in and about the performance of their official duties, one as Deputy United States Marshal serving processes and the others aiding in the service of the processes in the performance of their official duties in and about the enforcement of the Prohibition Law, and asking that the causes be removed from the Illinois Circuit Court to the United States District Court. Upon a consideration of these petitions the Court granted the writ of habeas corpus cum causa in each of the cases. The Clerk of the Peoria County Circuit Court complied with the writ and transmitted to the Clerk of this Court certified copies of the several indictments in the causes. All of the defendants appeared and gave bond in this Court, in the said several sums fixed by the Circuit Court of Peoria County, for their appearance in this Court. No appearance was entered by the State's Attorney in the proceedings to remove the causes, but on last Saturday, October 31st, he appeared in Court and in each of the criminal proceedings—Nos. 313, 314, 315, and 316, entered his motion to remand the cause to the Circuit Court of Peoria County. After appearing and furnishing capias bail by defendant Asher and prior to the motion of the State to remand, the death of defendant Asher was suggested and the cause abated as to him.

The chief reasons assigned by the State's Attorney of Peoria County upon which he bases his motions to remand, are as follows:

(1) That the United States District Court has no jurisdiction in the premises.

(2) That the petitions for the writs of habeas corpus cum causa were insufficient and informal.

(3) That the defendants in these cases are not within any of the classes of persons referred to in Sec. 33 of the Judicial Code.

(4) That defendant Moody was not in the performance of his duty as a Deputy United States Marshal at the time of the commission of the alleged offenses.

(5) That defendant Hartzig is merely a Federal prohibition agent and does not come within the provisions of the statute authorizing civil or criminal proceedings instituted in State Courts against them, to be removed to the United States Courts.

All other reasons were eliminated in the argument at the bar.

Ordinarily, the question of jurisdiction can not be raised upon a mere motion to remand. (*Carlyle* v. *Sunset Telephone & Telegraph Co.*, 116 Fed. 896.) However, as such motion is in effect a demurrer to the petition for removal, the Court is disposed to give the matter of jurisdiction consideration.

The State does not contend that Sec. 33 of the Judicial Code is unconstitutional, nor can it do so inasmuch as the United States Supreme Court held it valid many years ago. *Tennessee* v. *Davis*, 100 U. S. 257, 25 L. Ed. 648.

The only serious question presented is as to whether or not the defendants in the criminal cases

are persons coming within the classes of persons granted the right of removal in cases of this character. All proceedings in this Court involving the indictments herein are predicated upon Sec. 33 of the Judicial Code of the United States, which provided, in so far as material here, the following:

> When any * * * criminal prosecution is commenced in any court of a State against any officer appointed under or by authority of any revenue law of the United States * * * on account of any act done under color of his office or any such law, * * * and affects the validity of any such law, or against any officers of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer * * * the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court. * * *
>
> The cause shall thereupon be entered on the docket of the district court and shall proceed as a cause originally commenced in that court. * * * When it is commenced by capias or other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the State court * * * by the marshal of the district or his deputy * * *; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, * * *, and any further proceedings, trial or judgment therein in the State court shall be void.

It will be observed that when a defendant by appropriate petition brings himself within the provisions of this statute, practically no discretion remains in either the United States Court or the State Court with reference to the further disposition of the case in question. In such circumstances it becomes the duty of the United States Court to act and it is expressly provided that any further proceedings, trial or judgment in the State Court shall be void.

Sec. 33, *supra,* here involved, grew out of the nullification statute when South Carolina attempted to make it unlawful for revenue officers to collect revenue under a famous tariff act. The State contended it had the right to nullify the tariff law and attempted to do so by legislation. In the many years that followed its application became frequent and it has been amended several times, only, however, by increasing the classes of persons embraced within its provisions. The latest amendment was in 1916, when the provision, " or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer," was added.

It is contended very earnestly on behalf of the State of Illinois that because defendant Hartzig is a Federal prohibition Agent, appointed and acting under the National Prohibition Act, that therefore he is not such a revenue officer as is contemplated in Sec. 33 aforesaid. The State relies principally upon two District Court decisions, *Smith* v. *Gilliam,* 282 Fed. 628, and *Wolkin* v. *Gibney,* 3 Fed. (2nd) 960. In *Smith* v. *Gilliam,* which was an exhaustive opinion remanding a murder case to

the State Courts of Kentucky, the defendants were prohibition agents. The question as to whether the National Prohibition Law was a revenue law within the meaning of Sec. 33 was presented, but the petitioning defendants contended it made no difference whether the National Prohibition Act was a revenue law, or not, for the reason that Sec. 28 of the National Prohibition Act gave them (the defendants there) all of the power of protection of revenue officers. Sec. 28 is as follows:

> The commissioner, his assistants, agents and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

Because the statute just referred to did not contain some special provision showing an affirmative intent on the part of Congress to embrace the right of removal, the District Court there held that Sec. 28 did not apply and that the cases had been improperly removed and therefore should be remanded. The learned judge who wrote the opinion made an elaborate investigation of the "law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States" and set out in the opinion a digest of all of the statutes conferring power and protection to revenue agents and officers. All of these various provisions of the law were referred to except Sec. 33 of the Judicial Code.

In South Carolina revenue collectors and agents had been arrested upon criminal charges for attempting to collect customs taxes and it seems clear to this Court that the original conception of the statute was to furnish protection against possible unwarranted criminal prosecutions in the State Courts and was in its nature the very essence of protection to those engaged in that service at that time. There are many cases in the books where the rights given to revenue officers under Sec. 33 have been invoked as a protection to them in the performance of their duties in many of the jurisdictions of the United States.

In *Tennessee* v. *Davis,* 100 U. S. 257, the defendant there was indicted in the State Court for murder. A petition was filed in the United States Circuit Court, asking that the cause be removed for trial. The sitting judges of the Circuit Court were not in agreement upon the power of the Circuit Court to remove the murder case from the State Court to the Federal Court and submitted that question to the United States Supreme Court. The Supreme Court in that case answered the question of the Circuit Court as to the power of removal in the affirmative and held that the Circuit Court did have the power. The Supreme Court, in passing upon the question, said:

> A more important question can hardly be imagined. Upon its answer may depend the possibility of the General Government preserving its own existence. As was said in *Martin* v. *Hunter,* 1 Wheat. 363, " The General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents,

> and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in the State Court for an alleged offense against the law of the State, yet warranted by the federal authority they possess, and if the General Government is powerless to interfere at once *for their protection;* if their protection must be left to the action of the State Court; the operations of the General Government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to its laws. It may deny the authority conferred by those laws. The State Court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operation of the government. And even if, after trial and final judgment in the State Court, the case can be brought into the United States Court, for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested.

It will thus be seen from this discussion that the statute which is now known as Sec. 33 of the Judicial Code, is in its essence a measure of protection. Protection to not only the Government itself, but to the officers and agents through which it acts. Sec. 33 was a part of the existing law at the date of the passage of Sec. 28 of the National Prohibition Act. Until the passage of the National Prohibition Act, or the War Prohibition Act, which it

amended, all laws relating to the manufacture and sale of intoxicating liquors enacted by Congress were purely revenue laws and their enforcement and the collection of the excise taxes were committed to the Bureau of Internal Revenue and the law was administered by revenue collectors and agents. And in the course of the administration of these revenue laws there were many cases where revenue agents were attacked and it was found necessary in self-defense to shoot to protect themselves. In many of these cases the local authorities instituted criminal proceedings against the revenue agents growing out of these unfortunate affairs. In some of the localities it was apparent there were hostile communities and public officers in sympathy with those who were violating the law and whose criminal conduct brought about the unfortunate affairs upon which criminal prosecutions were predicated, and, as a matter of protection, the criminal cases were removed for trial to the Federal Court. This was the history that was before Congress at the time of the enactment of the National Prohibition Law. I can not agree with the learned Court of the Western District of Kentucky that it was not the clear intention and purpose of Congress to give to Federal prohibition agents all of the protection in the performance of their duties that prior thereto had been given to revenue officers, and one of the many elements of protection given to those officers was the right to have criminal prosecutions instituted against them in State Courts while they were in and about the performance of their duties as Federal prohibition agents, removed to the United States Court for trial.

The other authority relied upon by the State is that of *Wolkin* v. *Gibney, supra.* In that case the

learned judge who wrote the opinion, bases his conclusions upon the case of *Smith* v. *Gilliam, supra,* and *Lipke* v. *Lederer,* 259 U. S. 557. The latter case was cited as holding "The Federal Prohibition Act is not a revenue act." In that case Justice McReynolds, who wrote the opinion for the Court, simply held that the double penalty to be assessed by revenue collectors under certain circumstances was invalid because that particular tax was in truth and in fact a penalty.

By the 18th Amendment to the Constitution the Congress and the States were given concurrent power to enforce the provisions of the prohibition section of the Amendment. It was within the power of the Congress to do so by any species of law it saw fit. If for reasons satisfactory to Congress it concluded to enact a revenue law that would enforce the provisions of the prohibition amendment, it was within the power of that body to do so, and in doing so instead of providing for the enforcement of the law in the Department of Justice, it concluded to do so through the Treasury Department and the Bureau of Internal Revenue. The act expressly directs that the Commissioner of Internal Revenue and his assistants, agents and inspectors shall investigate and report violations of the law to the United States Attorney, who is charged with the duty of prosecuting offenders, etc. Sec. 35 recognizes as a part of the legislation all existing revenue laws and at the same time repealed all existing laws to the extent of their inconsistency with the National Prohibition Act. Title III is devoted almost entirely to tax and revenue matters upon liquor whose possession, sale and use may be lawful.

The law authorizes the sale of intoxicating liquor for use upon the prescription of physicians. Of course the purpose of the National Prohibition Law is to prevent as far as possible the manufacture and sale of intoxicating liquors as a beverage, but at the same time taxes the legitimate manufacture and use of intoxicating liquors. The taxing features of the National Prohibition Act and the existing law which is made a part of it by inference, may be only incidental, and yet that fact of itself would not have the effect to change its character from that of a revenue law.

This same contention was urged upon the United States Supreme Court in *United States* v. *Doremus,* 249 U. S. 86, as the reason why the Harrison Narcotic Drug Act (Act of December 17, 1914, c. 1, 38 Stat. 785, U. S. Comp. Stat. 1916, Sec. 6287–g) should be declared unconstitutional by it. It was there contended that the narcotic business might properly be regulated by the States in the exercise of their police powers and that the States had never delegated that power to the Federal Government. It is admitted by everybody that the revenue features of the Harrison Narcotic Drug Act are but incidental to the real purpose of the act. Yet the Supreme Court held " The act may not be declared unconstitutional because its effect may accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it." And yet the validity of that act could only be sustained upon the theory that it was a revenue act.

In the application of Sec. 28 the District Court for the Southern District of New York followed

the case of *Smith* v. *Gilliam, supra,* without comment.

The solution of the question as to whether the National Prohibition Act is a revenue act is unnecessary to the proper determination of the issues here raised, because regardless of whether the Prohibition Law is a revenue law, or not, those who are charged with its enforcement are granted all of the power and protection afforded revenue officers who were engaged in the enforcement of the liquor laws prior to the passage of the Prohibition Act, by Sec. 28.

In all four of these cases it happens that the Grand Jury of Peoria County in the indictments joined Walter Moody, one of the Deputy Marshals of this district. As to him, the provisions of the law are very clear and positive and I do not understand that counsel for the State is seriously challenging his right to invoke the privilege of removal granted by Sec. 33 to "any officer of the courts of the United States." A deputy marshal is so far an officer of the court that he is subject to removal by the court at pleasure. Rev. Stat. Sec. 780, U. S. Comp. Stat. 1916, Sec. 1304.

The petitions upon which these causes were removed are sufficient in form. *State of Tennessee* v. *Davis,* 100 U. S. 257; 25 L. Ed. 648.

The several motions to remand will be denied.

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